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In the Supreme Court of the United States

October Term, 1962
No. 763

PENNSYLVANIA PUBLIC UTILITY COMMISSION,
Petitioner

vs.

WESTINGHOUSE ELECTRIC CORPORATION
ALLIS-CHALMERS MANUFACTURING COMPANY
GENERAL ELECTRIC COMPANY
MOLONEY ELECTRIC COMPANY
WAGNER ELECTRIC CORPORATION
McGRAW EDISON COMPANY,
Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1963
No.

Pennsylvania Public Utility Commission,
Petitioner

vs.

Westinghouse Electric Corporation
Allis-Chalmers Manufacturing Company
General Electric Company
Moloney Electric Company
Wagner Electric Corporation
McGraw Edison Company,
Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

To the Honorable, the Chief Justice and Justices of the Supreme Court of the United States:

The petitioner, Pennsylvania Public Utility Commission, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit entered at Appeal No. 13,876 in the above entitled case on September 26, 1962, affirming, by a two to one majority, the judgment of the United States District Court for the Eastern District of Pennsylvania, entered November 1, 1961, at Civil Action No. 30,015.

A. OPINIONS BELOW

The opinion delivered by the United States Court of Appeals for the Third Circuit, to which certiorari is sought, is reported at 308 Fed. 2d 856, and is appended hereto as Appendix A, pages 23 to 31. The dissenting opinion of the same Court is also reported at 308 Fed. 2d, beginning on page 861, and is appended hereto as Appendix B, pages 32 to 36. No formal opinion was ever entered by the District Court for the Eastern District of Pennsylvania; however, the record as filed in the Court of Appeals contains the District Court's remarks following oral argument on the question of intervention, indicating the reasons for its refusal to allow same. These remarks are contained on pages 48a to 50a of the Consolidated Appendix filed in the Court of Appeals, and are also appended hereto for the convenience of this Court as Appendix C, pages 37 to 38.

B. STATEMENT OF GROUNDS ON WHICH THIS COURT'S JURISDICTION IS INVOKED

I. The judgment of the Court of Appeals for the Third Circuit sought to be reviewed is dated September 26, 1962, and was entered on that date.

II. On October 23, 1962, the Court of Appeals denied your petitioner's petition for rehearing of that Court's September 26, 1962, judgment.

III. Jurisdiction to review the judgment by writ of certiorari is conferred on this Court by Section 1254(1) of the Judicial Code, 28 U.S.C.A. §1254(1).

C. QUESTIONS PRESENTED FOR REVIEW

1. Where suits seeking large sums as triple damages under Section 4 of the Clayton Act, 15 U.S.C. §15, from manufacturers for injuries said to flow from restraints of trade and prices unlawfully inflated in violation of Section 1 of the Sherman Act, 15 U.S.C. §1, have been instituted on behalf of an entire class of public utilities whose rates and service it is a state commission's duty to regulate, have the District Court and the majority of the Court of Appeals erred in holding the Commission to be without right to intervene as a party plaintiff under Rule 24(a)(2), F.R.C.P., to protect the public interest?

2. Under the above circumstances, have the lower courts erred or abused their discretion in disallowing permissive intervention also sought by the Commission for the same purpose under Rule 24(b)?

D. STATUTES AND RULE INVOLVED

The statutes involved in this case are: Section 1 of the Sherman Act, 15 U.S.C. §1, reading in pertinent part:

> "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal: . . ."

Section 4 of the Clayton Act, 15 U.S.C. §15, reading:

> "Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee."

Also involved is Rule 24, Federal Rules of Civil Procedure, reading in pertinent part:

> "(a) Intervention of Right. Upon timely applications anyone shall be permitted to intervene in an action: (1) when a statute of the United States confers an unconditional right to intervene; or (2) when the representation of the applicant's interest by existing parties is or may be inadequate and the applicant is or may be bound by a judgment in the action; or (3) when the applicant is so situated as to

be adversely affected by a distribution or other disposition of property which is in the custody or subject to the control or disposition of the court or an officer thereof.

"(b) Permissive Intervention. Upon timely application anyone may be permitted to intervene in an action: (1) when a statute of the United States confers a conditional right to intervene; or (2) when an applicant's claim or defense and the main action have a question of law or fact in common. . . . In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.

"(c) Procedure. A person desiring to intervene shall serve a motion to intervene upon all parties affected thereby. The motion shall state the grounds therefor and shall be accompanied by a pleading setting forth the claim or defense for which intervention is sought. The same procedure shall be followed when a statute of the United States gives a right to intervene. . ."

E. STATEMENT OF THE CASE

On August 2, 1961, Philadelphia Electric Company instituted Civil Action 30,015 in the United States District Court for the Eastern District of Pennsylvania, naming as defendants Westinghouse Electric Corporation, Allis-Chalmers Manufacturing Company, General Electric Company, Moloney Electric Company, Wagner Electric Corporation, and McGraw Edison Company. The complaint sought to recover on behalf of the plaintiff as representative of a "class consisting of all public utilities furnishing electric service to consumers in Pennsylvania, all of which are subject to regulation by the Pennsylvania Public Utility Commission", overcharges alleged to have been paid by the plaintiff and the other class members in connection with the purchase of power transformers manufactured and sold by defendants from May, 1956, to date. The complaint averred that the defendants had unlawfully conspired to fix prices of such equipment in violation of the Sherman Act, 15 U.S.C. §1, that such conspiracy had inflated the prices which the plaintiff would otherwise have been obliged to pay, and that as a result of such unlawful conspiracy the plaintiff was entitled to triple damages for the amount of the overcharges. The complaint also prayed for discovery, accounting, and other relief. It also cited defendants' criminal convictions in the same court on December 8, 1960, and February 6, 1961, for having violated the anti-trust laws in the same context as set forth in the civil complaint.

With Civil Action 30,015 Philadelphia Electric Company simultaneously filed ten other class actions naming

as defendants some of the above named and also certain other manufacturers of heavy electrical equipment, and seeking recoveries incident to purchases of other types of electrical equipment on substantially the same theory as set forth in No. 30,015. These suits were filed at Nos. 30,016 to 30,025, inclusive. Later in August, 1961, Philadelphia Electric Company filed five additional suits of this kind at Nos. 30,158 to 30,162, inclusive.

On September 8, 1961, Pennsylvania Public Utility Commission filed and served motions under Rule 24, Federal Rules of Civil Procedure, for leave to intervene as a party plaintiff in all sixteen of Philadelphia Electric Company's class suits. The motions averred that the plaintiff and all the members of the class on behalf of which the suits were brought, were public utility companies furnishing electric energy to the public for compensation in Pennsylvania; and that the Commission was the governmental and public agency of the Commonwealth of Pennsylvania solely charged with and responsible for the regulation in the public interest of the rates and service being rendered by the plaintiff and the other members of the class.

The motions further averred that the Commission had an interest in Civil Action 30,015 and its companion cases centering in its statutory obligation to review such recoveries as might be made by the members of the plaintiff class to determine their effect on rate base, expenses, or both for each member of the plaintiff class, for present or future years, or both, and to consider whether, if adjustments in these determinations were necessitated by such recoveries, benefits should flow to the patrons of the respective utilities in the form of refunds, lowered rates, or both. The motion further averred that in the event recoveries were to be made by the members of the

plaintiff class, the Commission might, in order properly to discharge its responsibilities, be further obliged to allocate or apportion each recovery as between compensatory and exemplary damages, and stated that such apportionment would be difficult, if not impossible, without having been accorded the status of a party to the suits. The motions finally averred the necessity and propriety of the Commission's presence in the status of a party at any settlement negotiations, pre-trial conferences, or similar proceedings which might be held after the suits were at issue. In this connection, the motions averred the Commission's belief that its presence and participation might help toward assuring that any recoveries made by way of settlement would be adequate, and that the Court might have available, if it desired, the Commission's special knowledge of utility operations and regulation affecting many aspects of the cases.

Philadelphia Electric Company, the class plaintiff, did not oppose the Commission's motion to intervene in any of the suits. Defendant Westinghouse Electric Corporation moved to strike the motion on the ground that the Commission had failed to attach a copy of a pleading setting forth the claim or defense for which intervention was sought. Defendant Allis-Chalmers filed an answer to the motion opposing intervention on that ground, as well as on others, which asserted lack of Commission standing or interest in the controversy. The other defendants at No. 30,015 took no formal action to oppose intervention, although some of them opposed the proposed intervention in the context of the companion suits. Subsequently, the Commission filed and served complaints accompanying its motions to intervene in each of the sixteen cases; in substance, these complaints adopted the averments of

Philadelphia Electric Company's complaints as its own and incorporated the averments of its motions to intervene relating to its right and standing.

On October 24, 1961, the motions to intervene were orally argued before the District Court (Kirkpatrick, Senior Judge). Immediately following argument the Court orally denied intervention. This disposition was docketed. The Court's remarks indicating its reasons for so disposing of the motions are contained in Appendix C to this petition. In denying intervention, the District Court specifically declined to rest its decision on the narrow ground urged in Allis-Chalmers' motion to strike, but held the Commission to be without standing to intervene in the proceedings either in its own capacity as a regulatory and quasi-judicial body, or in its representative capacity as a proponent of the interest of the public at large.

On November 1, 1961, the District Court entered a second order in writing supplementing its oral order of October 24, 1961. This order provided that the Commission's motion to intervene "shall be and is hereby denied". At the same time, the Court entered its certificate in the form specified by Section 1292(b) of the Judicial Code, 28 U.S.C. §1292(b), for the purpose of facilitating an interlocutory appeal.

Thereafter, the Commission filed applications to the United States Court of Appeals for the Third Circuit under Section 1292(b) for leave to prosecute interlocutory appeals from the October 24 and November 1, 1961, orders. These applications, which the defendants at Civil Action No. 30,015 opposed, were denied by the Court of Appeals without opinion on December 18, 1961. Meanwhile, however, the Commission on November 22, 1961, had filed

seasonable and separate notices of appeal under Rule 73, F.R.C.P., from both the October 24, and November 1, 1961, orders. The appeal from the October 24, oral order was eventually docketed at No. 13,875 in the Court of Appeals, that from the November 1, 1961, written order at No. 13,876.

The defendants thereafter moved the Court of Appeals to dismiss both appeals, taking the position that neither of the lower court's dispositions of the Commission's motion to intervene had resulted in an appealable order. The Court of Appeals reserved decision on the motions to dismiss until such time as it would consider the cases on their merits.

On September 26, 1962, following oral argument held June 7, the Court of Appeals, in an opinion entered by Judge Hastie at No. 13876 in which Judge Staley concurred, affirmed the District Court's November 1, 1961, order, after first holding that denial of intervention was appealable as of right. Judge McLaughlin filed a dissenting opinion which would have reversed the District Court and would have allowed intervention. At the same time, at No. 13,875, the Court of Appeals dismissed the Commission's appeal from the District Court's oral order of October 24, 1961. The Commission's petition for rehearing of the result reached in No. 13,876 was denied on October 23, 1962.

By stipulations filed in and approved by the District Court, the parties to the fifteen companion actions have agreed that the result in the instant proceedings shall also control the question of Commission intervention in those cases.

F. ARGUMENT

1. Intervention as of Right Has Been Erroneously and Unjustly Denied

Petitioner believes the majority decision of the Court of Appeals both to be erroneous in law with respect to the construction accorded Rule 24(a) controlling intervention as of right, and to be an abuse of judicial discretion insofar as petitioner's attempt to intervene has been predicated on Rule 24(b), controlling permissive intervention.

A fair, rather than formalistic, interpretation of clause (2), Rule 24(a) shows clearly that intervention by a public agency of the type represented by your petitioner, is contemplated under the somewhat atypical facts at bar. This clause provides that "anyone" shall be permitted, on timely application, to intervene

> "when the representation of the applicant's interest by existing parties is or may be inadequate *and* the applicant is *or may be* bound by a judgment in the action." (Emphasis supplied.)

The majority of the Court of Appeals impliedly recognizes that as a practical matter the Commission's regulatory powers will be circumscribed by the form and the pecuniary limits of any judgment which the District Court may enter, and that the Commission *is* therefore in every practical sense "bound by [such] judgment". The ma-

jority nevertheless predicates its conclusion that Rule 24(a) does not allow intervention on your petitioner's asserted failure to demonstrate that the representation of its interest by existing parties "is or may be inadequate". This position ignores the essential difference between the public interest of your petitioner, and the purely private interests which are represented by the present parties to this litigation. It is the difference in the nature of these interests which, without more, leads to the present inadequacy of representation. Only if the private interests of Philadelphia Electric Company and the other members of the class it represents are absolutely equated with the interests of your petitioner, can it be said that your petitioner's interests are now adequately represented.

Such an equation, impliedly subscribed to by the majority of the Court of Appeals, flies in the face of fact. As clearly pointed out in the Commission's petition to intervene, its own interest and that of the present plaintiff class, though presently parallel, are *not* identical. Inevitably a time will come when these interests will diverge, and your petitioner in order properly to discharge its duty under the state law will have to examine the nature and amount of the recoveries which may flow from these suits, in an effort to determine their ultimate effect, if any, on rates and ratepayers. In order for the public interest properly to be represented, it is imperative and essential that your petitioner have an opportunity to be heard in the District Court *before* the form and limits of the judgment are finally fixed, whether by verdict or by court-approved settlement. Adequate representation cannot consist merely of the rendition of the judgment, which, so far as your petitioner is concerned, would without intervention be a fait accompli.

It is not without significance that clause 2 of Rule 24(a) is so worded as not to require an applicant for intervention uniformly to show that existing representation *is* inadequate. The rule specifically relaxes the requirements in favor of an application for intervention by allowing intervention both where representation "is" inadequate and where representation "may be" inadequate. Surely this relaxation constitutes Congressional and judicial recognition of what at least one District Court has recognized as the special status of public agencies under Rule 24(a) in atypical situations. In *Mitchell v. Singstad*, 23 F.R.D. 62, 1959 (D.C., Md.) the District Court allowed a state roads commission to intervene in an action by the United States Secretary of Labor against certain defendants doing business in interstate commerce, which had sought to enjoin the defendants from violating the Fair Labor Standards Act by, assertedly, underpaying employees. Even though the state agency's sole interest in the controversy was pecuniary in that an increase in wage costs would increase the state's liability under its road construction contract with the defendants, the District Court allowed intervention, saying,

> "Grounds for intervention under a literal interpretation of Rule 24(a) or (b), F. R. Civ. P., 28 U.S.C.A. do not exist. However, where the public interest is clear, courts permit a state or a federal agency to intervene, as parens patriae or other grounds. Securities and Exchange Comm. v. United States Realty & Improvement Co., 310 U.S. 434, 459, 460, 60 S. Ct. 1044, 84 L. Ed. 1293, and cases cited; People of State of California v. United States, 9 Cir., 180 F. 2d 596, 601; XVIII N.Y.U.L.Q. Rev. 148-150. Intervention by private groups has been permitted in unusual

cases where the public interest was sufficiently imperative. Textile Workers Union of America v. Allendale Co., 96 U.S. App. D.C. 401, 226 F. 2d 765. Admittedly there is strong authority to the contrary, but the decision in each case must be made on its own merits, in the light of the dominant purpose of the Federal Rules of Civil Procedure—to secure the just determination of every action. Rule 1."

The dissenting opinion perceptively exposes the real reason for the majority's conclusion that failure to show inadequacy of existing representation bars intervention. This reason is not, in actuality, that present representation is adequate, so much as the fact that your petitioner's claim is in a broad sense non-pecuniary. In Judge McLaughlin's words:

> "The objection really stressed and urged as overwhelming is that the Commission at this initial point of the litigation is unable to put a hard dollars and cents figure on that public interest. That there will be recoveries in these claims; that they will probably be by way of settlement; that the amounts will be large; that they will affect the Pennsylvania utility rates as the Commission alleges, no one seems to seriously doubt."

The anomaly of the majority's position is readily apparent when the history of Rule 24 is only briefly considered. Nothing in that history shows that Rule 24 is any less available for intervention where the proposed interveners' interest is nonpecuniary or inchoate, than where that interest can be measured forthrightly in money. Rule 24 amplifies and restates the prior federal practice *both at law and in equity: True Gun-All Equipment Corp. v.*

Bishop, 26 F.R.D. 150, 1960 (D.C., Ky.); therefore, a non-pecuniary interest in the outcome of litigation which is wholly pecuniary as between the original parties, is clearly in the nature of an equitable interest which neither the present plaintiffs nor the present defendants can adequately represent.

The inadequacy of present representation is even more striking when the effect of that portion of Section 4 of the Clayton Act which provides for triple damages, is additionally considered. Obviously, it is in the interest of the defendant manufacturers of electrical equipment to emerge from this litigation with an obligation to pay as little to the plaintiff customers as possible. Conversely, it is obviously to the interest of the plaintiff class of electric utilities to emerge from this litigation with as large judgments as possible, and thereafter to retain as much as they can of the fruits of their recoveries. It is not unreasonable to think that those portions of the recoveries which can successfully be stamped by the plaintiffs as having been awarded to them as punitive damages, will form a less ready source of benefits to ratepayers, than those portions characterized as compensatory damages. The majority's mechanistic solution to this prospective problem of allocation—one which may prove to be of utmost difficulty to a state regulatory agency—is:

> "But even if only the total amount of the recovery should be stated, the actual damages are determinable merely by dividing the amount of the judgment by three."

The record before this Court clearly demonstrates that the Commission's right to intervene in this litigation is equivalent or superior to the right under Rule 24(a)(2) of

an ordinary litigant interest only in a pecuniary claim or defense. As stated by Berger, "Intervention by Public Agencies in Private Litigation in Federal Courts," 50 Yale Law Journal 65, 1940:

> "The logic of thus extending to governmental agencies the right to intervene in suits between private parties to protect a public interest is confirmed by the cases."

The same authority states:

> "So far as governmental intervention is concerned, Florida v. Georgia, 17 Howard 478, seems clearly to indicate that the requirement that an intervenor be 'bound by the judgment' means merely that the effect of the judgment would be prejudicial."

In *Missouri-Kansas Pipeline Co. v. United States*, 312 U.S. 502, 61 S. Ct. 666, 1941, the Supreme Court has held that where intervention is sought in what the Court terms "unconventional form", the considerations which must govern are the public interest and the practicalities apparent to the lower court. Here these have been ignored. As plainly appears from the Commission's motion and proposed complaint, the salient averments of which are undenied of record, any recovery made by the class of electric utilities which the Commission is bound to regulate and control in the public interest, will also conclusively delimit the extent and possibily even the manner, in which the benefits shall eventually flow to those utilities' patrons. Once these recoveries are made, whether by judgment or by voluntary settlement, the Commission will be wholly without opportunity to appear or to be heard on

the issues of fairness or adequacy. An even more difficult problem can be foreseen as likely to arise from the partly penal nature of the claims asserted by the plaintiff class.

Without some expression by the parties or by the lower court in the final resolution of the instant litigation, the door is left open to a claim on the part of plaintiff regulatee that the greater part of the recovery is private and personal to themselves, and bears no impress of the public interest. An even more difficult situation can be visualized if private settlements, not disclosed to the public but known only to the parties and to the court, are consummated.

The foregoing eventualities are some of the reasons, your petitioner believes, why the words "or may be" find their way into Rule 24(a)(2) in two places. Petitioner submits that these words were intended to provide for atypical attempts to intervene where the applicant's right and standing cannot, in the nature of the situation, be fully known or predicted at the time of the application.

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2. Disallowance of Permissive Intervention Under These Circumstances Constitutes an Abuse of Judicial Discretion

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No better statement of the reasons why the disposition by the lower courts of the Commonwealth's petition to intervene constitutes an abuse of discretion, as well as legal

error, can be found than in the following portion of Judge McLaughlin's dissenting opinion:

> "Under the second independent ground for granting appellant's application, it is admitted that the district court could have properly allowed the application. However, states the majority, the denial was not arbitrary or an abuse of discretion. The reason advanced for that conclusion is that there is '* * * no showing of such clear and substantial advantage from the allowance of intervention as *could* make its denial arbitrary or an abuse of discretion.' (Emphasis supplied). The court again stresses what it considers the grave fault of the Commission's position, namely, that the Commission does not contend that if it is refused intervention, the public will necessarily be mulcted. And once again sharp attention must be directed to the Commission's primary motivation in making its timely application—the elimination of possible inadequate handling of these important claims.
>
> "On this branch of the appeal the court, to justify washing its hands of the Commission's request, cites the delay the Commission participation would occasion. It suggests that at the least there would be 'additional questions, objections, briefs, arguments, motions and the like * * *'. Actually that time element of itself would be small but even so it is not of the essence here. The 'just determination' of these actions as stated in Rule 1 of the Federal Rules of Civil Procedure is the true goal and the only goal. That course is charted in the forward looking, most acceptable decision (not mentioned by the court) of Mitchell v. Singstad, 23 F.R.D. 62 (D.C. Md. 1959).

"The complacent, resigned view that nothing can or should be done to take care of the imperative public interest in these actions leaves me fundamentally uneasy. The arguments of the appellee—not within the letter of the rule, delay, turn the trial into a brawl—strain too much. The acquiescence in them by the court brushes aside the impressive merit of appellant's position. It should not be so casually rejected. A large segment of the people of Pennsylvania have a tangible stake in this final reckoning of defendants' unconscionable activities. They are entitled to have their expert, responsible representative in a position to check on it now and not be relegated to some meaningless gesture after the final disposal of the claims."

As perceptively noted in another portion of Judge McLaughlin's dissent, this Court's decision in *Securities and Exchange Commission v. United States Realty and Improvement Company*, 310 U.S. 434, 60 S. Ct. 1044, 1940, throws light on both segments of this argument. This case stands, first, for the rule that governmental agencies representing the public interest stand in a special status even in the context of intervention as of right under Rule 24(a). Second, however, the case stands for the proposition that even where intervention may not be of right, judicial discretion is not abused where the agency's special status impels it for proper reasons to request intervention as of grace under Rule 24(b). In that case this Court held the District Court not to have abused its discretion in permitting intervention although this court refrained from ruling on whether such intervention was of right:

"The Court of Appeals thought that the Commission had no such special interest as to entitle it to in-

tervene as of right in the Chaper XI proceeding and concluded that the district court erred in permitting the intervention and that from this it followed that the Commission had no right to appeal. Its decision is in effect that a governmental agency not asserting the right to possession or control of specific property involved in a litigation may not be permitted to intervene without statutory authority. Neither Chapter X nor Chapter XI, in terms, gives a right of 'intervention,' but the Commission is authorized, with the permission of the court, to appear in any Chapter X proceedings §208. Such right as the Commission may have to intervene in a Chapter XI proceeding is, therefore governed by the Rules of Civil Procedure, 28 U.S.C.A. following section 723c, and the general principles governing intervention. We are not here concerned with the refinements of the distinction between intervention, as a matter of right, which the Court of Appeals thought was restricted to cases where the intervenor has a direct pecuniary interest in the litigation, and permissive intervention, a distinction which has been preserved by Rule 24 of the Rules of Civil Procedure.' For here the question is not of the Commission's intervention 'as of right', but whether the district court abused its discretion in permitting it to intervene."

See also *Illinois-Iowa Power Company v. North American Light and Power Company*, 49 F. Supp. 277, 1943 (D.C., Del.); *Textile Workers Union v. Amazon Cotton Mills Company*, 76 F. Supp. 165, 1948 (D.C., N.C.); *American Airways v. Cedarhurst*, 201 F. 2d 273, 1953; "Federal

Intervention in Private Actions Involving the Public Interest," 65 Harvard Law Review 319.

Respectfully submitted,

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APPENDIX A

OPINION OF THE UNITED STATES COURT OF APPEALS

(308 Federal Reporter, 2d Series 856)

Philadelphia Electric Co., on Behalf of Itself and All Others Similarly Situated,

v.

Westinghouse Electric Corporation, Allis-Chalmers Manufacturing Company, General Electric Company, McGraw Edison Company, Moloney Electric Company and Wagner Electric Corporation.

Pennsylvania Public Utility Commission,
Appellant

Nos. 13875, 13876

United States Court of Appeals
Third Circuit

Argued June 7, 1962.
Decided Sept. 26, 1962.
Rehearing Denied Oct. 23, 1962.

Before McLaughlin, Staley and Hastie, Circuit Judges.

Hastie, Circuit Judge.

On August 2, 1961, the Philadelphia Electric Company brought this "spurious" class action[1] in the district court against suppliers of electric equipment, asserting representation of "all public utilities furnishing electric service to consumers in Pennsylvania, all of which are subject to regulation by the Pennsylvania Public Utility Commission". The plaintiff seeks to recover three times the amount of overcharges allegedly unlawful under the federal antitrust laws. The action has not yet progressed much beyond the pleading stage. A month after suit was filed, the Pennsylvania Public Utilities Commission sought leave to intervene. This appeal has been taken by the Commission from the denial of that petition.

In essence, the Commissions' petition advanced two justifications for the proposed intervention. First, it pointed out that in the event the Electric Company prevailed in this suit, the Commission "may be obliged" to reexamine and decide what benefits the consuming public should receive by virtue of the utility's recovery. In that event, "without having the status of a party in these proceedings, the Commission will find it difficult, if not impossible, to make * * * allocations or apportionments [between compensatory and punitive damages] nor can it properly determine whether both or only one of these elements of recovery should be considered in determining the benefits, if any, which should be directed to flow to the utility's consumers."

Secondly, contemplating the possibility of a settlement, the Commission believes that as "the sole statutory

[1] This is one of the several similar suits and we are told that the parties have stipulated that our decision on this appeal shall control the issue of intervention in all.

representative of the Pennsylvania public at large", it is imperative in the public interest that the Commission should be "present in the status of a party at any settlement negotiations" because it "believes that its presence and participation may be helpful toward assuring that any recoveries * * * made by way of settlement shall be proper and adequate, and that the Court will have available, if it desires, the Commission's special knowledge of public utility operations and regulation which affect the many aspects of these cases."

In its brief on this appeal, the Commission has suggested yet a third reason for permitting it to intervene: that it is the guardian of the interests of the consuming public, who may be the ultimate beneficiaries of a recovery by the electric company, and if intervention is denied, "once these recoveries are made, whether by judgment or by voluntary settlement, the Commission will be wholly without opportunity to appear or to be heard on the issues of fairness or adequacy."

The Commission asserts no justiciable claim against any party to the suit. Although it filed a proposed "complaint", to comply with Rule 24(c), 28 U.S.C., the pleading seeks no judgment in favor of the Commission but states that the "proposed intervenor incorporates herein and adopts as its own, the averments of plaintiff's complaint." In brief, the Commission asks merely that the plaintiff recover in accordance with its complaint.

After argument, the lower court denied leave to intervene. Although no written opinion was filed, the court indicated from the bench the reasons for its decision. It thought that the Commission could seek intervention only as "an agent of the consumers of electric power who are in

the areas affected by the alleged conspiracy * * *", and that, acting in such capacity, the Commission had to show a right in the consumers under section 4 of the Clayton Act, 15 U.S.C.A. §15, which permits suit only by those injured in their property or business. The consumers as a group could not meet this requirement. In sum, the interest sought to be represented by the Commission was in the view of the court below, "entirely too remote to permit the intervention * * *."

On October 24, 1961, the clerk made a docket entry pursuant to the court's oral ruling. On November 2nd a written order denying leave to intervene was filed and an appropriate docket entry was made. Out of an abundance of caution the Commission has filed separate timely appeals from these orders.[2] However, nothing turns on this since the same matter is presented by both appeals. Thereafter, the defendants moved to dismiss this attempted appeal of right for lack of jurisdiction, but this court reserved decision on this question until after argument on the merits.

[1] The first issue for this court is whether the denial of leave to intervene is appealable of right. When an absolute right to intervene in a lawsuit is claimed, and the claim is rejected, the order denying intervention is considered final and appealable. E. g., Sam Fox Publishing Co. v. United States, 1961, 366 U.S. 683, 687-688, 81 S. Ct. 1309, 6 L. Ed. 2d 604; Sutphen Estates, Inc. v. United States, 1951, 342 U.S. 19, 72 S. Ct. 14, 96 L. Ed. 19; Brotherhood of R. R. Trainmen v. Baltimore & O. R. R., 1947, 331 U.S. 519, 67 S. Ct. 1387, 91 L. Ed. 1646; Allen

[2] In addition, the Commission asked us to entertain an appeal as from an interlocutory order, as we are permitted to do under 28 U.S.C. §1292(b). On December 18, 1961, we denied that motion.

Calculators, Inc. v. National Cash Register Co., 1944, 322 U.S. 137, 64 S. Ct. 905, 88 L. Ed. 1188; Missouri-Kansas Pipe Line Co. v. United States, 1941, 312 U.S. 502, 61 S. Ct. 666, 85 L. Ed. 975; Hirshorn v. Mine Safety Appliances Co., 3d Cir., 1951, 186 F. 2d 1023. But in those situations where the law grants the trial court discretion to permit or deny intervention in the interest of the fair and efficient administration of justice, it is held that an appellate court has no jurisdiction to review a denial of leave to intervene, except upon the issue of alleged abuse of discretion. E. g., Sutphen Estates, Inc. v. United States, supra; Allen Calculators, Inc. v. National Cash Register Co., supra; Kennedy v. Bethlehem Steel Co., 3d Cir. 1939, 102 F. 2d 141.

Both the wrongful denial of an absolute right to intervene and, alternatively, an abuse of discretion are claimed here. Therefore, this appeal is well taken and must be decided on its merits.

Rule 24(a) of the Federal Rules of Civil Procedure deals with the subject of intervention of right.[3] That rule confers upon an interested person an unqualified right to intervene in an action "(2) When the representation of the applicant's interest by existing parties is or may be inadequate and the applicant is or may be bound by a judgment in the action". Even if the phrase "bound by a judgment in the action" is construed to embrace any prejudice to the

[3] "(a) Intervention of Right. Upon timely application anyone shall be permitted to intervene in an action: (1) when a statute of the United States confers an unconditional right to intervene; or (2) when the representation of the applicant's interest by existing parties is or may be inadequate and the applicant is or may be bound by a judgment in the action; or (3) when the applicant is so situated as to be adversely affected by a distribution or other disposition of property which is in the custody or subject to the control or disposition of the court or an officer thereof."

legal rights or interests of the would be intervenor, no such prospective injury has been shown here.

The Commission argues that it may undertake to require that at least part of any recovery in this suit be reflected in reduced rates of the plaintiff's customers, consumers whose interests the Commission serves and protects. It is anxious, therefore, that the amount of recovery, whether by settlement or otherwise, shall be as large as may be proper and that the Commission be fully informed as to all transactions connected with the prosecution and disposition of the litigation that may help it in determining what part of any recovery shall be allocated to the reduction of rates.

To the extent that the concern of the Commission is that the plaintiff recover the full amount to which it is entitled, the Commission's interest and that of the plaintiff are identical. There is no suggestion that the plaintiff does not have highly competent counsel. Nowhere has the Commission suggested any fear or any basis of apprehension that the plaintiff will not pursue its suit with vigor as well as skill. Indeed, at oral argument counsel for the Commission expressly stated that no such contention was made. In these circumstances, if the Commission desires to make witnesses available who have some information relevant to the plaintiff's claim, or if it thinks it can supply useful expert opinion as a friend of the court, there is no reason to believe that the plaintiff or the district court, as the case may be, would reject any proper tender of assistance in the just disposition of the pending litigation. We conclude, therefore, that any interest the Commission may have in the adequacy of the plaintiff's prospective recovery cannot be a basis for intervention of right, par-

ticularly since Rule 24(a)(2) expressly requires that the would be intervenor shall show that "the representation of the applicant's interest by existing parties is or may be inadequate".

An additional point argued in this connection is plainly without merit. The Commission expresses fear that it will not be informed how much of any recovery is compensatory and how much represents punitive damages. Section 4 of the Clayton Act, 15 U.S.C.A. §15, under which the plaintiff claims damages, expressly provides that the injured person "shall recover threefold the damages by him sustained * * *." In practice, decisions under this section indicate both the amount of actual damage and the trebled amount for which judgment is entered. But even if only the total amount of the recovery should be stated, the actual damages are determinable merely by dividing the amount of the judgment by three.

Only brief mention need be made of the Commission's contention that it desires to know what takes place in the course of litigation and particularly the circumstances underlying any settlement. The Pennsylvania Public Utility Code gives the Commission broad power to require that utilities supply "reports concerning any matter whatsoever about which the commission is authorized to inquire, * * * or which it is required to enforce", and "furnish any and all * * * information to the commission * * * required, in any inspection, examination, inquiry, investigation, hearing, or determination [of the value of the utility's property]." 66 P.S. §§1345, 1346. These provisions give the Commission simple and direct means of obtaining the complete details of any settlement which increases the assets of a utility and may affect its rates.

[2] All of these factors considered, we are satisfied that no basis was shown for intervention of right under the mandate of Rule 24(a)(2). It may well be, as the Commission contends, that in special circumstances a court should allow intervention to protect an applicant against hurtful practical consequences of a pending suit that are not technically within the language of Rule 24(a)(2), as was done in Securities and Exchange Commission v. United States Realty & Improvement Co., 1940, 310 U.S. 434, 60 S. Ct. 1044, 84 L. Ed. 1293. But what has already been said indicates that the requested intervention here has not been shown to be vital to the protection of the public interests of which the Commission is the guardian. Certainly it does not appear that as a result of not being a party to this suit the Commission will suffer any substantial handicap in performing its duty with reference to any recovery by the plaintiff in this suit.

A fortiori, if the Commission's application is viewed as a request for permissive intervention, there is no showing of such clear and substantial advantage from the allowance of intervention as could make its denial arbitrary or an abuse of discretion. It is always a consideration against permissive intervention that additional parties "take additional time. Even if they have no witnesses of their own, they are the source of additional questions, objections, briefs, arguments, motions and the like * * *." See Crosby Steam Gage & Valve Co. v. Manning, Maxwell & Moore, Inc., D. Mass. 1943, 51 F. Supp. 972, 973. Of course, Rule 24(a)(2) expressly commands that in exercising its discretion upon an application for permissive intervention the court shall consider the delay involved.

In thus disposing of this appeal we have not found it necessary to consider the conclusion of the court below

that the stated interest of the Commission in the pending litigation is not even the kind of a claim upon which a court may, in its discretion, grant permissive intervention. Cf. Commonwealth Edison Co. v. Allis-Chalmers Mfg. Co., 1962, 207 F. Supp. 252, in the District Court for the Northern District of Illinois.

On the appeal at our No. 13,876, the judgment will be affirmed. The separate appeal on identical grounds at our No. 13,875 will be dismissed.

APPENDIX B

DISSENTING OPINION

McLaughlin, Circuit Judge (dissenting).

Appellant is the Commonwealth of Pennsylvania Public Utility Commission which, as alleged, is the Commonwealth's "* * * governmental and public agency solely charged with and responsible for the regulation in the public interest of the rates received and service rendered by the plaintiff in these actions and all of the other public utility members of the class." This and fifteen similar suits seek to recover on behalf of plaintiff and all other electric utilities under appellant's regulatory jurisdiction, overcharges said to have been paid by them in connection with the purchase of power transformers manufactured and sold by defendants from May 1956 to date. The overcharges are stated to have resulted "from certain combinations and conspiracies in restraint of trade said to have been entered into between the defendants in violation of the Clayton Act, 15 U.S.C. 1."

The Commission asserts its interest in this and the related actions because of the fact that the contemplated recoveries by the utility plaintiffs may oblige the Commission to reexamine its rate making factors so as to determine whether there should be refunds, lowered rates or both to the consumer public. And the Commission urges "that it is imperative in the public interest that it, the sole statutory representative of the Pennsylvania public

at large, be present in the status of a party at any settlement negotiations, pretrial conferences, and similar proceedings, which may be held after these suits are at issue. The Commission believes that its presence and participation may be helpful toward assuring that any recoveries which may be made by way of settlement shall be proper and adequate, and that the Court will have available, if it desires, the Commission's special knowledge of public utility operations and regulation which affect many aspects of these cases. In stating this belief, the Commission is thoroughly aware of the rule that class litigation is not subject to settlement without approval of the Court. It nevertheless believes, and respectfully represents that the amount of the recoveries which are sought in these suits, as well as the important issues of law and fact which are involved, justify its intervention as a party."

I see no negation of the presence of a clear public interest, or of the rightness of the Commission's acceptance of its responsibility to represent that interest. The objection really stressed and urged as overwhelming is that the Commission at this initial point of the litigation is unable to put a hard dollars and cents figure on that public interest. That there will be recoveries in these claims; that they will probably be by way of settlement; that the amounts will be large; that they will affect the Pennsylvania utility rates as the Commission alleges, no one seems to seriously doubt.

The district court thought such a substantial question of law and fact was involved in the issue that it certified the case for immediate appeal. This court, while denying formal intervention, would permit a sort of back door, illusory intervention by assuming that "there is no reason

to believe that the plaintiff or the district court, as the case may be, would reject any proper tender of assistance, in the just disposition of the pending litigation." In passing, it should not be necessary to note that it is not the plaintiff but the defendants who oppose the Commission's request to be given a legitimate status in the proceedings.

The majority is satisfied that the Commission does not meet the requirement of Rule 24(a)(2). As I see it, that satisfaction is unwarranted. The Commission affirmatively alleges as above quoted that it is imperative that it, as the public's representative, be present at any settlement negotiations, pretrial conferences, etc. after the suits are at issue. It states that it "* * * believes its presence and participation may be helpful toward assuring that any recoveries which may be made *shall be proper and adequate* * * *" (Emphasis supplied). A literal reading of the rule calls for no more than this. As the majority states: "That rule confers upon an interested person an unqualified right to intervene in an action '(2) when the representation of the applicant's interest by existing parties is or may be inadequate and the applicant is or may be bound by the judgment in the action'". It is the Commission's deep conviction that settlement of the claims, if that occurs, should be closely scrutinized by it during the negotiations therefor, not after settlement is an accomplished fact. That concept is substantially acceded to by the court but the latter misconceives its purpose. The Commission is not seeking to check the final settlement figures and mechanically adjust rates and refunds from that source. What the Commission expressly desires is to have full knowledge of the settlement negotiations while they are being conducted. Its purpose is to make sure that the

settlements themselves are fair with particular reference to the consumer public. At the outset of this proceeding the Commission shows its origin, shows the grave existing margin for error or worse and how complete, simple, justified provision against it can and should be taken. Defendants in their pretentious objection to this are displaying a very late righteous attitude, impossible to justify under the allegations of the complaint detailing the basis for this suit.

Not only is the Commission within the expressed language of Rule 24(a)(2) as seen above but in addition the sound law is that it need not come within the exact statement of the rule where it is in the salutory process of guarding the public from the substantial harm that could well arise out of these cases if the Commission is barred from appearing. That is the doctrine of Securities and Exchange Commission v. United States Realty & Improvement Co., 310 U.S. 434, 60 S. Ct. 1044, 84 L. Ed. 1293 (1940), and so conceded by the court opinion. It is to prevent that further addenda to this whole nauseating mess that the Commission asked leave to participate.

Under the second independent ground for granting appellant's application, it is admitted that the district court could have properly allowed the application. However, states the majority, the denial was not arbitrary or an abuse of discretion. The reason advanced for that conclusion is that there is "* * * no showing of such clear and substantial advantage from the allowance of intervention as could make its denial arbitrary or an abuse of discretion." (Emphasis supplied). The court again stresses what it considers the grave fault of the Commission's position, namely, that the Commission does not contend that if it is refused intervention, the public will necessarily be muleted.

And once again sharp attention must be directed to the Commission's primary motivation in making its timely application—the elimination of possible inadequate handling of these important claims.

On this branch of the appeal the court, to justify washing its hands of the Commission's request, cites the delay the Commission participation would occasion. It suggests that at the least there would be "additional questions, objections, briefs, arguments, motions and the like * * *." Actually that time element of itself would be small but even so it is not of the essence here. The "just determination" of these actions as stated in Rule 1 of the Federal Rules of Civil Procedure is the true goal and the only goal. That course is charted in the forward looking, most acceptable decision (not mentioned by the court) of Mitchell v. Singstad, 23 F.R.D. 62 (D.C. Md. 1959).

The complacent, resigned view that nothing can or should be done to take care of the imperative public interest in these actions leaves me fundamentally uneasy. The arguments of the appellee—not within the letter of the rule, delay, turn the trial into a brawl—strain too much. The acquiescence in them by the court brushes aside the impressive merit of appellant's position. It should not be so casually rejected. A large segment of the people of Pennsylvania have a tangible stake in this final reckoning of defendants' unconscionable activities. They are entitled to have their expert, responsible representative in a position to check on it now and not be relegated to some meaningless gesture after the final disposition of the claims.

I would allow the Commission to intervene.

APPENDIX C

REMARKS OF DISTRICT COURT
(Pages 48a-50a, Consolidated Appendix)

THE COURT: I think that if the rules provided for intervention are taken literally the applicant does not come within the scope of any rule.

The only possibility upon which a claim of this kind or an application of this kind can be sustained is by considering the applicant for intervention as an agent of the consumers of electric power who are in the areas affected by the alleged conspiracy, or even putting them in the place of—in the shoes of that portion of the public that is involved.

Of course, a claim of that kind is really adverse to the plaintiff rather than to the defendant and if it is carried too far might allow the intervention of the Public Utility Commission in every suit in which a public utility stood to lose or recover an amount of money.

I have no doubt it would not exercise such a right, if it had any, in the smaller cases and I am sure it would do what Mr. Ward agreed it would in the case of a large disaster that threatened the continuation of the utility's work.

Even if you regard the Commission as an agent of the consumers or of the public generally, it does not seem to me that it qualifies within Section 4 of the Clayton Act as

a party injured in his property or business. I am quite sure those are the words, although I don't have the Act with me.

In other words, you must put a limit somewhere on the point where persons qualify as parties under that section of the Act. It is generally recognized, as I said in an earlier opinion in the Harrison case, that stockholders, creditors, or employees of corporations do not come within the Act although as such persons undeniably suffer injury in their property if the corporation is injured, and it would seem the Courts recognize that the Act does not give a right of action to everyone who can trace a financial loss, however remote, to a violation of the antitrust laws.

I think within that principle that the consumer's interests, which are the only bases on which the application could be sustained, are entirely too remote to permit the intervention in this case and I will, therefore, strike the motion. I will deny the motion to intervene.

I had better recess for a few minutes and see whether we will take the other point up before lunch.

MR. INGERSOLL: Do I understand that counsel who are not interested in the Fort Pierce situation are dismissed from court?

THE COURT: Oh, no, there is no reason for them to stay. That is the reason I took it up last.

(A recess was had.)

* * * * * * * * *